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NO. 82-115

IN THE UNITED STATES SUPREME COURT OCTOBER TERM, 1981

RAMON CERVANTES,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ of Certiorari To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER THE TRIAL COURT'S LIMITATION OF THE CROSS-EXAMINATION OF THE STATE'S PRINCIPAL WITNESS VIOLATED PETITIONER'S RIGHTS UNDER THE CONFRONTATION CLAUSE OF THE SIXTH AND FOURTEENTH AMENDMENTS?

II. WHETHER THE FAILURE OF THE TEXAS COURT OF CRIMINAL APPEALS TO CONSIDER ONE OF PETITIONER'S ARGUMENTS ON APPEAL DEPRIVED HIM OF DUE PROCESS OF LAW OR EFFECTIVE ASSISTANCE OF COUNSEL?

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

COMES NOW The State of Texas, Respondent herein, by and through her attorney, the Attorney General of Texas, and respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the decision of the Texas Court of Criminal Appeals in this case.

OPINION BELOW

The judgment of the Texas Court of Criminal Appeals is attached to the petition for writ of certiorari as Appendix A.

JURISDICTION STATEMENT

The Petitioner seeks review by certiorari of a judgment of the Texas Court of Criminal Appeals entered April 14, 1982, in Appeal No. 59, 838, affirming Petitioner's conviction in Dallas County, Texas. A timely filed petition for rehearing was denied on May 26, 1982. This petition was filed on July 7, 1982. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. V:

> No person shall ... be deprived of life, liberty, or property without due process of law ...

U.S. CONST. amend. XIV:

> ... no State shall make or enforce any law which shall abridge the privilages or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; or deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.

STATEMENT OF THE CASE

Petitioner was charged by indictment with the offense of solicitation to commit capital murder alleged to have

occurred on or about October 23, 1976, in Dallas, Texas. 15.03 TEX. PENAL CODE (Vernon). He was convicted by a jury on November 9, 1977, in Criminal District Court No. 4 of Dallas County, Texas, and assessed fifteen years confinement in the Texas Department of Corrections. The sufficiency of the evidence is not challenged here.

The evidence adduced at trial established that the State's principal witness, Michael Moore, received a telephone call on October 5, 1976, from a man who was later identified as Petitioner. Petitioner indicated that he wanted a man killed, discussed the amount of money Moore would charge to handle the job, and gave Moore the business address, a physical description of the intended victim, and other information. Later that same day, Moore obtained the name of the intended victim, one John Ralston, Sr., and determined that he was one of Petitioner's neighbors.

After calling the intended victim to warn him, Moore contacted the Dallas Police Department, agreed to cooperate in their investigation of the phone call, and to record any future telephone conversations.

Over the next few weeks, the police recorded five conversations between Moore and Petitioner wherein they discussed the details of payment and the method of the intended killing. Petitioner also requested Moore to put a second man in the hospital, in addition to the intended killing. Moore and Petitioner agreed to meet in the parking lot of a Denny's Restaurant at 2:30 on the afternoon of October 23, 1976. The police investigators equipped Moore with a body-microphone in order to tape the conversation at the meeting, and also brought a surveillance vehicle to the parking lot in order to videotape the meeting. The recording of the taped conversation during this meeting revealed that Petitioner continued to discuss the murder for hire and the addi-

tional beating, and gave Moore $200. Petitioner was arrested at his home the following day.

During a pre-trial hearing on a motion in limine made by the State, and outside the presence of the jury, Petitioner made out a bill of exceptions which established that Moore had been charged on October 29, 1974, with a weapons offense which was dropped in January of 1975, and with the offense of assault on September 13, 1976, which was dismissed on October 6, 1976. The evidence also showed that Moore had been placed on three years probation for burglary on October 3, 1975, and received an early discharge from probation on February 24, 1977. The probation records indicated a number of other arrests for which charges were never filed. The trial court excluded the proffered impeachment evidence.

On appeal, Petitioner claimed that the trial court's action deprived him to his right to effective cross-examination under the Sixth Amendment to the United States Constitution and *Davis v. Alaska*, 415 U.S. 308 (1974), because he was denied an opportunity to establish the witness's possible bias or motive for testifying. The Texas Court of Criminal Appeals held that the trial court had not abused its discretion in limiting cross-examination, and had acted properly under Texas law and under *Davis v. Alaska, supra.* This petition for writ of certiorari followed.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE TRIAL COURT'S LIMITATION OF CROSS-EXAMINATION DOES NOT PRESENT A QUESTION WORTHY OF THIS COURT'S REVIEW.

A. The Court's Action at Petitioner's Trial Did Not Violate His Rights Under the Confrontation Clause of the Sixth Amendment.

At the outset, it should be recognized that the trial court at Petitioner's trial acted properly under state law. Recent Texas cases recognize the right of the defendant to establish any facts tending to establish ill feeling, bias, or motive on the part of a witness testifying for the State. *Coleman v. State*, 545 S.W.2d 831 (Tex.Crim.App. 1977). Trial courts, however, have traditionally been accorded broad discretion to dictate how such facts may be proved, and particularly where the proof involves collateral evidence. Accordingly, the Texas courts have employed a balancing test to accommodate the tension between two competing interests. The probative value of the evidence sought to be introduced must be balanced against the prejudicial impact of the evidence, including undue prejudice, embarrassment, harassment to either a witness or a party, and the possibility of undue delay. *Carrillo v. State*, 591 S.W.2d 876 (Tex.Crim.App. 1979).

In general, unadjudicated criminal offenses may not be used to impeach a witness in a criminal case. *See*, Article 38.29, TEX. CODE CRIM. PROC. (Vernon); *Bilbrey v. State*, 594 S.W.2d 754 (Tex.Crim.app. 1980). Though such evidence cannot be used to impeach a witness on the basis of general bad character or bad reputation, specific facts can be shown which tend to establish that the witness was under undue pressure or had entered into an agreement with the prosecution to testify on behalf of the State in a particular case. *See, e.g., Randell v. State*, 565 S.W.2d 927 (Tex.Crim.App. 1978); *Castro v. State*, 562 S.W.2d 252 (Tex.Crim.App. 1978). The procedure in Texas for evaluating the proper balance as set forth in *Carrillo, supra*, is to allow a defendant to explore the possibility of an agreement or unac-

ceptable bias in a bill of exceptions. If the bill shows some evidence of a *quid pro quo* for the witness's testimony, such evidence may be elicited before the jury. If not, then the evidence of collateral matters is not sufficiently probative to overcome the dangers of undue prejudice and jury speculation.

In this case, the trial court specifically found that there was no evidence of an agreement between the prosecution and Michael Moore. Although the record shows that he was discharged from proobation after he had served a little more than one-third of his probation, the officer who introduced the records testified that he knew of no agreement and that it was not unusual for a probationer to be discharged early if he had abided by the terms of his sentence. As to the two unadjudicated charges, one had been dismissed a full year before Michael Moore's initial contact with the Dallas Police regarding Petitioner, and the other charge was dropped at the request of Dallas County prosecuting authorities on the force of an affidavit of non-prosecution by the complaining witness, which was signed on September 17, 1976, again before Moore's contact with the police. In light of all the available evidence, the Texas Court of Criminal Appeals held that the trial court had not abused its discretion.

The procedure developed by the Texas state courts to guard the rights of a defendant while also protecting the State's interest are of course not subject to federal review unless that procedure deprives the defendant of some constitutional right. It is submitted that the action of the trial court in this instance, as ratified by the Texas Court of Criminal Appeals, is fully consistent with the values embodied in the Sixth Amendment. This Court has recognized that the Sixth Amendment does not guarantee unlimited cross-examination. A trial judge must exercise discretion to limit cross-examination in collateral matters. *Glasser v.*

United States, 315 U.S. 60 (1942). It also may limit cross-examination to protect a witness from being harassed or humiliated, *Alford v. United States*, 282 U.S. 687 (1931), or to put a stop to unduly prejudicial or repetitious cross-examination. *Davis v. Alaska*, *supra*. The defendant's right under the Sixth Amendment is to effectively cross-examine the witnesses against him.

What is effective cross-examination must necessarily depend on the issues at stake. In the context of this and similar cases, the important issue is whether the jury has enough evidence before it to intelligently evaluate the witness's testimony. *See, e.g., Skinner v Cardwell*, 564 F.2d 1381, 1389 (9th Cir. 1977), and cases cited therein. Various federal courts have recognized that this determination may properly hinge on the judge's deicision as to the relevance of the evidence in issue. *United States v. Gambler*, 662 F.2d 834 (9th Cir. 1981); *Skinner, supra; Chipman v. Mercer*, 628 F.2d 528 (9th Cir. 1980). In the case at bar, although the jury was not allowed to hear about Michael Moore's previous unadjudicated offenses, the State did elicit testimony concerning his probation and early discharge. On cross-examination before the jury, Moore stated that the Dallas police officials had told him they would send letters to his probation officer in order to help him obtain early release from probation. He also admitted to working as an informant in the past. Thus, the jury had reliable testimony in the witness's own words, on the basis of which they could consider the possibility of an agreement with the prosecution authorities, or bias against the Petitioner. The Petitioner was allowed to cross-examine Moore as to these matters; therefore, the trial judge's action in excluding other testimony which could only have led to speculation and confusion of the issues does not constitute a deprivation of Petitioner's Sixth Amendment rights.

Even if this Court agrees with Petitioner's conclusion that *Davis v. Alaska*, was not properly applied to his case, such a complaint is not a subject worthy of Supreme Court review. Petitioner has made no showing of a widespread practice in Texas of misapplying this Court's pronouncements on the proper scope of a trial court's discretion with regard to *Davis v. Alaska*. It is well-established that the Court sits to decide important, novel, or recurring questions, not to correct alleged errors or injustices in particular cases. This case represents nothing more than a trial court exercising its sound discretion as to a matter which this Court has recognized to be a proper subject of judicial control. The Sixth Amendment should not become a vehicle for state defendants to obtain federal review of every such decision by a trial judge. Since there is no constitutional issue at stake here, certiorari should be denied. *See, Davis v. Alaska, supra* at 321 (Rehnquist, J. dissenting).

B. Whether The Court Below Properly Applied a "Harmless Error" Rationale to any Sixth Amendment Violation at Petitioner's Trial is Not Presented Under the Circumstances of This Case.

Petitioner seeks review of his conviction partly on the basis on the conflict among the Circuits as to whether a trial court's erroneous limitation of cross-examination can ever be harmless error. Whether or not it would be sufficient to invoke this Court's certiorari jurisdiction, the question is not presented in this case. First, as discussed above, no constitutional error is shown. Beyond that, however, it is far from clear that the Texas Court of Criminal Appeals affirmed Petitioner's conviction on the basis of a "harmless error" doctrine.

Petitioner relies for his argument on language on page 8 of the state court's opinion, setting up the evidence

elicited by the defense in its bill of exceptions and on cross-examination before the jury (Petitioner for Certiorari, 6). In the context of the entire paragraph, however, it is clear that the quoted language related instead to the substantive question whether the trial court abused its discretion in excluding the evidence of extraneous matters.[1] The court, after expounding the doctrine announced in *Carrillo v. State, supra*, applied the facts of Petitioner's case to that procedure. It reviewed the relevant testimony, noted that Petitioner had been allowed to fully explore the possibility of an agreement between Moore and the State in the bill, and that the jury was apprised of the fact that Moore had been on felony probation during the time he was cooperating with the police. The court concluded that the Petitioner had failed to adduce any evidence, either in the bill of exceptions or on cross-examination, suggesting an agreement, bias, or improper motive and that the trial court's ruling was therefore consistent with *Carrillo v. State, supra*, and not an abuse of its discretion. At most, the quoted language is ambiguous as to whether the Texas courts would apply the harmless error rule to a certain type of trial error. This Court's exercise of its certiorari jurisdiction, however, should be reserved for a case where the question is squarely presented. The petition should be denied.

C. Petitioner Has Not Established A Clear Conflict Among the Circuits Regarding the "Harmless Error" Rule.

Petitioner asserts that the courts of appeals are hopelessly divided on the question whether a defendant must demonstrate that a Sixth Amendment violation is

1. Petitioner also claims that by not submitting such evidence to the jury, the trial court pretermitted the jury's function as fact-finder. Since the judge found *no evidence* of an agreement, however, the issue was not one of the credibility of witnesses.

prejudicial in order to obtain a reversal of his conviction. A review of the cited cases, however, reveals that no such conflict exists. *See,* Petition for Certiorari, 6-8. Many of the cases either address the problem in dicta, *Skinner v. Cardwell,* 564 F.2d 1381 (9th Cir. 1977), or were decided prior to *Davis v. Alaska, supra. United States v. Morris,* 485 F.2d 1385 (5th Cir. 1973); *United States v. Jorgensen,* 451 F.2d 516 (10th Cir. 1971), *cert. denied,* 443 U.S. 319 (1972).[2]

The circuits which have considered the question overwhelmingly have applied the harmless error rule to erroneous limitation of cross-examination. *See,* cases cited in Petition for Certiorari, 8; *United States v. Gambler,* 662 F.2d 834 (D.C. Cir. 1981); *Victory v. Bombard,* 570 F.2d 66 (2d Cir. 1978); *United States v. Polk,* 550 F.2d 1265 (10th Cir.), *cert. denied,* 434 U.S. 838 (1977); *United States v. Fife,* 573 F.2d 377 (6th Cir. 1976). Many have applied an automatic reversal rule only when cross-examination was completely foreclosed. *Greene v. Wainwright,* 634 F.2d 272 (5th Cir. 1981); *Chipman v. Mercer, supra.* Petitioner points out no more than a conflict within the Ninth Circuit, *United States v. Williams,* 668 F.2d 1064, 1070 n.14 (9th Cir. 1981); *Gambler, supra,* at 840, n.6, which is insufficient to justify this Court's review. Any conflict among the Courts of Appeals on this issue will be ripe for Supreme Court review only when the issue is resolved within the Circuits.

Moreover, it is submitted that the application of the harmless error rule is not improper in cases similar to this one. This Court has recognized that the existence of constitutional error does not rule out the possibility

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2. Petitioner's view of the law rests on language in *Davis v. Alaska* to the effect that denial of effective cross-examination "'would be constitutional error of the first magnitude and no amount of showing of want or prejudice would cure it.'" at 318.

of harmless error. *Milton v. Wainwright*, 407 U.S. 371 (1972); *Schnebel v. Florida*, 405 U.S. 427 (1972). Even prior to *Davis v. Alaska*, *supra*, the Court explicitly applied a harmless error standard to Sixth Amendment violations. *Harrington v. California*, 395 U.S. 250 (1969). It would be an unjustifiable waste of judicial resources automatically to reverse a conviction on the basis of a minor lapse, if it was not prejudicial. The language of *Holloway v. Arkansas*, 435 U.S. 475 (1978) is particularly instructive.

> In normal cases where the harmless error rule is applied, the error occurs at trial and its scope is readily identifiable. Accordingly, the reviewing court can undertake with some confidence its relatively narrow tasks of assessing the likelihood that the error materially affected the deliberations of the jury.

Holloway v. Arkansas, *supra*, at 490. Petitioner's is just such a case. He was accorded the opportunity to fully develop a bill of exceptions setting out all the impeachment evidence he wished to present to the jury. The Texas Court of Criminal Appeals had a full record on which to evaluate the prejudicial impact, had they found the trial court erred. Thus, in the absence of a true conflict among the Circuits, or a substantial question for review, certiorari on this issue should be denied.

II. PETITIONER'S SECOND GROUND PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

Petitioner seeks a writ of certiorari on the additional ground that the court below misconstrued his sixth ground of error—the trial court's refusal to allow individual questioning of jury veniremen. Instead, according to Petitioner, the Texas Court of Criminal Appeals addressed a different question—whether Peti-

tioner was entitled to individual voir dire away from the rest of the panel. The alleged misapprehension of his argument is said to amount to a denial of due process of law or effective assistance of counsel, under the Sixth and Fourteenth Amendments.

Although couched in terms of constitutional rights, this issue raised nothing more than a question of state procedure. As Petitioner acknowledges, Texas law does not require an appeals court to write on every issue. *Hawkins v. State*, 613 S.W.2d 720, 723, n.8 (Tex.Crim.App. 1981). Petitioner claims that the court below failed even to consider his voir dire argument, based on his reading of the opinion. The court's statement of the issue was whether Petitioner "should have been allowed to question the members of the voir dire individually regarding their ethnic prejudices". Petition for Certiorari, Appendix A, 23. Limitation of voir dire in non-capital cases had occasioned reversal in Texas only where the defense was not permitted to ask certain questions, according to the court; since there was no such limitation in the present case, the trial court had not abused its discretion. Petition for Certiorari, Appendix A, 25. Thus, the language of the opinion is equally supportive of the view that the court below did consider Petitioner's argument. Further, since the issue was briefed at length by both parties and re-urged in Defendant's Motion for Rehearing, it is unlikely that it was completely ignored by the court.

At any rate, the state court's failure to consider the particular argument does not amount to a denial of due process.[3] Appeal from a state court conviction is not a matter of right. *Abney v. United States*, 645 U.S. 681

3. Petitioner's ineffective assistance argument is inapposite. Such a claim must rest on allegations of some action, or inaction, of the attorney, which are not present here. *E.g., Rinehart v. Brewer*, 561 F.2d 126 (8th Cir. 1977).

(1977). Thus, an irregularity in state appellate procedure raises a constitutional issue only if it results from *invidious* discrimination. *E.g., Anders v. California,* 386 U.S. 738 (1967). Here, although Petitioner cites cases articulating the standard, he fails even to allege invidious discrimination by the Texas Court of Criminal Appeals.

Since Petitioner's claim does not raise a substantial federal question, this Court should decline to review the purely speculative claim.

For the foregoing reasons, Respondent respectfully prays that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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